

April 19, 2000

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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DECISION ON APPEAL OF NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E9900708**

FRED MACKS
(FAN FAMILY TRUST)
Code Enforcement Appeal

Location: 1129 Upper Preston Road

Appellant: **Fred Macks**
401 - 100th Avenue Northeast #128
Bellevue, WA 98004
Telephone: (425) 462-7894

King County: DDES/Code Enforcement Section, *represented by*
Manuela Winter
930 Oakesdale Avenue Southwest
Renton, Washington 98055
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SUMMARY OF DECISION:

Department's Preliminary Recommendation:	Deny the appeal
Department's Final Recommendation:	Deny the appeal
Examiner's Decision:	Deny the appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	February 11, 2000
Hearing Closed:	March 15, 2000

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Administrative tolerance of violations—precedential effect
- Clearing and grading violations
- Erosion and sedimentation control
- Forest practices
 - jurisdiction
 - grading permit exemptions
- Late staff report
- Nonconforming uses
- Shoreline jurisdiction
- Wetland and stream alterations

SUMMARY:

Except for the forest practices and building permit citations that were dismissed, the appeal is denied.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

A. PROCEDURAL MATTERS

1. A Notice and Order was issued by the King County Department of Development and Environmental Services to Fred Macks, Trustee for the FAN Family Trust, on October 12, 1999, citing code violations on property located at approximately 11229 Upper Preston Road. The Notice and Order citation covers 7 parcels comprising approximately 20 acres adjacent to the east bank of the Raging River. Because the original Notice and Order contained some incorrect parcel descriptions, the parties have stipulated to the issuance of a corrected Notice and Order with revised legal descriptions (Exhibit No. 68).
2. The Notice and Order superseded a Stop Work Order issued by DDES on June 24, 1999 and appealed by Mr. Macks and his wife Nell. As set out within a pre-hearing order issued January 11, 2000, the issues on appeal are the following:
 - a. Whether grading on the property occurred without the issuance of required King County grading permits;
 - b. Whether clearing and grading on the property occurred within regulated sensitive areas, including the Raging River, smaller on-site streams and wetlands and the buffers required for such sensitive areas;

- c. Whether clearing and grading on the property were performed without adequate erosion and sedimentation or drainage controls in place;
 - d. Whether clearing and grading was performed within the shoreline environment for the Raging River without either a shoreline substantial development permit or an exemption therefrom;
 - e. Whether a wooden deck was constructed on the site without required building permits.
3. The original Notice and Order also cited the Macks' property for conducting a Class IV General forest practice without required permits and approvals. The pre-hearing order dismissed this issue from the proceeding on the grounds that failure to obtain a required forest practice permit is not a separate violation of the grading ordinance. While an administrative agreement exists between King County and Washington Department of Natural Resources to transfer to County jurisdiction Class IV General forest practices, such agreement does not in itself make failure obtain a forest practice permit a violation of County regulations. As a consequence, this proceeding does not reach the question of whether the clearing and grading activities that occurred on the Macks' property constitute the conversion of forest land to non-forest uses.

At the hearing held on this appeal, the citation within the Notice and Order for constructing a wooden deck without a required building permit was withdrawn by DDES staff on the basis of documentary evidence that most of the structure was built before the Macks' ownership of the property. Finally, issues relating to the construction of an outhouse over a small on-site stream have been referred by DDES to the Health Department for investigation and enforcement action.

4. Due to the complexity of the issues raised within the Notice and Order, difficulties in arranging site inspections, the need to coordinate among various local and state agencies, and the health problems suffered by the Appellants, bringing this proceeding to a conclusion has been a slow and laborious process. In the procedural realm, two somewhat unusual circumstances need to be mentioned. First, in late January, 2000, some miscommunication occurred between DDES and the Appellants, whereby DDES believed it had an agreement for the continuance of the public hearing scheduled for February 11, 2000. In reliance upon this belief, DDES deferred production of its staff report. Later, in discussing a new hearing date with the Appellants, DDES discovered that an agreement for continuance in fact did not exist and that the Appellants were insisting on the February 11, 2000 date. This misunderstanding was resolved within a February 7, 2000 order from the Hearing Examiner's Office allowing for late submission of the staff report, but providing the Appellants with the opportunity for a continuance if required in their opinion to adequately respond to the matters related in the staff report.
5. This situation was further complicated at the public hearing held February 11, 2000 when it became evident that Nell Macks was quite ill. Accordingly, it was agreed that the Macks should be availed the opportunity to present their testimony at the outset of the hearing, then depart so that Mrs. Macks could be returned home. The ensuing arrangement was that the hearing was to continue to its conclusion with testimony received from the staff witnesses, then continued so that the Macks could provide written rebuttal testimony, with a further opportunity for limited written rebuttal also afforded to DDES. The Appellants' written rebuttal testimony appears in

the record as Exhibit No. 69, and the DDES response thereto is Exhibit No. 70.

6. Because the Macks operate on their property an experimental tree farm, the forest practices on their site are subject to regulation by the State Department of Natural Resources under the Forest Practices Act. Historically, DNR jurisdiction over a site to regulate forest practices has largely precluded concurrent jurisdiction by the County to protect and regulate sensitive areas, except in those circumstances where the property was undergoing conversion to non-forest uses. More recently, however, DNR and King County have entered into agreements that allow the County to exercise concurrent jurisdiction over sensitive areas issues in a wider range of instances. Nonetheless, some of the difficulties attendant to this appeal process can be attributed to an as yet incomplete set of protocols for coordinating DNR and local enforcement activities.
7. In March, 1994, an earlier Notice and Order was issued by King County to the Macks, alleging unlawful clearing and grading activities on their tree farm. Like the Notice and Order presently before us, this prior document cited the property for clearing and grading within sensitive areas and in a shoreline environment without required permits and approvals and for inadequate sedimentation control measures. Although the precise details are not clear, it appears that the 1994 Notice and Order was focused mainly on clearing and grading within the 100-foot buffer adjacent to the Raging River in preparation for the planting of tree seedlings. This activity appears to have been generally similar to some of the grading and planting activities currently alleged to have occurred near the northwest corner of the property, although the location of the 1994 activities was further south along the river frontage.
8. As with the current citation, pursuit of the 1994 Notice and Order required DDES to coordinate its activities with the State DNR. With respect to clearing and grading permit requirements, KCC 16.82.050.A(17)h, allows clearing to occur within regulated sensitive areas for Class II, III and IV Special forest practices if the property owner is operating pursuant to a long-term management plan approved by DNR. Thus, in Spring 1994, conversations took place among DDES and DNR staffs and Mr. Macks concerning the possibility that the Macks would submit to DNR a timber management plan. On April 9, 1994, Randy Sandin, Supervisor of Site Development Services for DDES, sent a letter to Mr. Macks summarizing these discussions and stating that, "if you and the DNR develop a management plan by June 1, 1994, with erosion sedimentation control for the disturbed areas within 200 feet of the Raging River, ...we will close our file." Mr. Sandin went on to describe the alternative option as follows: "Conversely, if we do not receive the management plan by June 1, 1994, the case will remain open and the appeal hearing will proceed as scheduled."
9. On June 3, 1994, a short memorandum was sent by Cyril Moya of DNR to Jim Ballweber of DDES stating that "The operations in question on Fred Macks' property...are bona fide forest practices as defined by RCW 76.09 and are administered by the Department of Natural Resources." The memo concludes by noting that, notwithstanding DNR forest practices jurisdiction, any activity on the Macks' property within shorelines jurisdiction may require a County shorelines permit.
10. The June 3, 1994 memorandum from Mr. Moya was forwarded to Mr. Macks on June 9, 1994 with an attached explanatory note under Mr. Sandin's signature. This cover letter states that Mr. Moya's memorandum "...fulfills the agreement of the April 12, 1994 administrative conference attended by yourself and DDES staff regarding the preparation of your property for long-term forestry..." and concludes that "Since the DNR has determined that the prior clearing activities

are 'bona fide forest practices as defined by RCW 76.09 and are administered by the Department of Natural Resources,' we are closing the file noted above and canceling the Notice and Order appeal hearing scheduled for June 30, 1994."

Following upon its June 9, 1994 letter, DDES issued a Notice of Satisfaction to Mr. Macks withdrawing the Notice and Order and stating that, "Department of Natural Resources has taken lead agency status for compliance."

11. Although Jim Ballweber, who appears to have drafted the June 9, 1994 DDES letter, claims that it does not provide to Mr. Macks a "carte blanche" for forest practices within sensitive areas and their buffers, there is no question that DDES staff retreated from its prior position. In April, the Department's position was that Mr. Macks could not obtain a grading permit exemption for his activities within sensitive areas unless he submitted an approved timber management plan by June 1, 1994. But by June 9 DDES had backed away from its earlier firm requirement of an approved management plan and had settled for the terse June 3 memo from DNR describing Mr. Macks activities generically as "bona fide forest practices." As we shall see later, Mr. Macks clearly perceived the position of weakness underlying the Department's June 9, 1994 letter and regarded it as a broad permission to continue tree farming activities within the Raging River sensitive areas buffer.
12. With respect to the current citation process, the relationship between the State DNR and County agencies has undergone a change. Although it issued its own Stop Work Order and appears to have been on top of the issues more quickly than was DDES, DNR in the current instance is deferring to County enforcement. The focus of DNR interest seems to have been on erosion control within the Raging River buffer and on potential conversion to non-forest uses. DNR Forester Susan Casey convened an interdisciplinary meeting among representatives of affected state and local agencies to visit the Macks' property on September 21, 1999, and issued a September 21, 1999 letter summarizing that meeting's findings. The letter concludes with the statement that, "King County is the lead agency in this matter" even though forest practice permits may be required.

B. SUBSTANTIVE VIOLATIONS

13. In view of the large size of the Macks' parcel and the fact that the alleged clearing and grading activities under review are dispersed over a wide area, DDES staff in Exhibit No. 67 segregated the parcel for purposes of discussion into four separate segments. As shown in Exhibit No. 67, Area A lies in the northwest corner of the property adjacent to the Raging River. Area B is in the southwest corner, also adjacent to the river. Area C lies east of Area D in the property's interior, while Area D lies in the center of the parcel within the triangle formed by the other three areas. This separation of the property into four areas for purposes of discussion and analysis is a useful device and will be employed throughout the remainder of the report.
14. As described by the testimony and accompanying photographs, within Area A a large space measuring approximately 200 feet square adjacent to the Raging River has been recently cleared and graded. If the grading is estimated to have occurred at a 6-inch average depth over the entire disturbed portion, the total grading activity would equal 742 cubic yards. While much of this area appears to have been prepared for replanting, a significant portion of it now consists of a series of river rock check dams interspersed with cedar seedlings and new grass plantings that

has been installed by Mr. Macks within the prior year for erosion and sedimentation control.

As shown by the photographs, the graded area goes right up to the edge of the Raging River, and in some places fill and vegetation have been bulldozed into the river channel itself. In addition, an old unpaved plat road dating back to the 1960's which forms part of a subdivision that was never completed has been re-graded with a new roadside ditch installed.

15. Mr. Macks explanation for his grading activities in Area A focuses on his need to solve a number of problems. First, he reports a long history of trespass on this portion of the property from motorcycles and off-road vehicles, creating ruts and erosion risks and destroying vegetation. His primary goal seems to have been to grade out the bike trails and replant the area with cedar seedlings. In addition, the old plat road runs down-gradient toward the river, and controlling erosion and sedimentation impacts from it were also a goal. Finally, the sedimentation control check dams and associated plantings appear to have been installed primarily as a response to the DNR Stop Work Order issued in early summer, 1999.
16. Although his techniques are not those suggested within the DNR and DDES Stop Work Orders, there seems to be a general agreement that Mr. Macks' check dam system provides reasonably adequate short term erosion and sedimentation control. In a letter to Mr. Macks dated September 29, 1999, DNR Forester Casey provides the following discussion of this issue:

“The area of concern that was addressed in the Stop Work Order No. 10749 was reviewed. The stop work order required that 3 inches of straw be placed on all exposed soils within 200 feet of the Raging River. You have raked, planted grass and cedar trees along with constructing rock berms to control surface erosion. This alternative to the required work appears to be an effective way of controlling fine sediments from entering the Raging River and satisfies the required work in Stop Work Order No. 10749 and subsequent Notice to Comply No. 14003. But will require monitoring through the winter months for effectiveness....Planting cedar trees within the rock berms is a very labor intensive method of reforestation but can be partially acceptable along with the commitment to maintain them to ensure their survival. You identified that your future plan is to transplant spruce trees into this area. Planting the site to achieve a survival of a minimum of 190 well distributed commercial trees per acre will meet the minimum standard described in the Forest Practices Act, WAC 222-34-010(2).”
17. The primary grading and sensitive areas issues to be addressed within a restoration context within Area A relate to the provision of adequate maintenance to the installed erosion control features; the need to provide better long-term sedimentation and erosion control, especially within the ditch alongside the old plat road; and the need to remove fill materials and provide restoration immediately adjacent to the Raging River channel.
18. Area B, as identified on the Macks' property, lies at its southwest corner, and the issues relating to its disturbance are dominated by wetland and stream hydrology. There is a small spring-fed stream that originates further east within Area C. Due to its origin, it appears to have good water quality and probably experiences a year-round flow. Owing to these factors, plus its generally gentle gradient and good gravel substrate, it was identified by fisheries biologist Dr. Stephen Conroy as providing quality spawning habitat for salmonids, with cutthroat trout in particular expected to be present. Because the Appellants have placed an outhouse structure directly above the channel for this stream, it came to be referred to within the hearing as “the outhouse stream”.

19. From its spring origin, this stream appears to flow south and then veer west adjacent to a dirt road on the site. At a point that appears to be somewhat more than 100 feet from the Raging River, the stream turns north before heading west again into a wetland area, then discharges to the river. It is in this lower part of the stream that most of the disturbances have occurred, including an effort to divert its channel so that it continues to flow west parallel to the dirt road; the placement of a berm consisting of stumps, slash and dirt next to the stream channel; the construction of the aforementioned outhouse above the stream channel; and disturbance of soils and removal of vegetation within the adjacent wetland area. In addition, the natural stream channel has been culverted beneath a dirt road constructed within the Raging River buffer, which culvert may impose a fish passage restriction. Finally, the dirt road itself appears to have been recently re-graded.
20. Portions of Area B near the property's south boundary and next to the Raging River were also cited in 1994 within the previous Notice and Order. This part of the property contains some sort of improvised drainage control pond near the west end of the dirt road, as well as areas up to the river channel that were cleared, graded and replanted in 1994.
21. Other than a general defense based on the 1994 precedent that will be discussed later in this report, the Appellants have made no attempt to explain or justify recent clearing and grading activities within Area B. And, indeed, based on the record, little justification would seem to be possible. It is evident that Mr. Macks has treated the small stream in Area B, which may be entitled to a Class 2 with salmonids designation under County sensitive areas regulations, simply as nuisance water to be manipulated and disposed in whatever manner seemed convenient.

Although Mr. Macks has vehemently contended that he is an exemplary steward of the environment, his actions within Areas A and B offer little support for this proposition, as least as far as salmonid resources go. Although obviously a competent tree scientist, it may simply be that Mr. Macks does know enough fisheries biology to appreciate the adverse consequences of his actions on the salmonid resource. In any event, diversion of natural stream flows, disturbance of stream channel substrate, removal of shade producing streamside vegetation, placement of an in-stream culvert, and loss of potential woody debris recruitment are all adverse consequences to the fisheries resource that may be reasonably attributed to his clearing and earth movement activities.

22. Area C lies inland of Area B to the east and is the site of major new clearing and grading activities covering more than an acre, and involving thousands of cubic yards of earth movement. The dirt road through this area adjacent to the outhouse stream appears to have undergone a major expansion, resulting in the re-grading of the ditch in which the upper portions of the stream flow. Potential sensitive areas issues in this portion of the property relate to the interception of ground water flow by the re-grading of the terrain, diversion of surface water flows, and the absence of effective erosion and sedimentation control measures. Because of the extensiveness of the clearing and grading activities within Area C, DNR suspects that a conversion of the property away from forest practice uses may be occurring. The Appellants have provided no explanation for or defense of the clearing and grading activities performed in Area C.
23. Area D lies in the approximate center of the site, nestled among Areas A, B and C. It contains a

cleared area that was cited within the 1994 Notice and Order, as well as a freight container apparently used for storage and a workshop, plus a pile of logs cut on other portions of the

property. The only activity cited within the current Notice and Order that relates to Area D is the alleged construction of a tree platform without necessary permits, which issue has been dismissed from the Notice and Order.

C. APPELLANTS' CONTENTIONS

24. The Appellants have raised a number of defenses to the Notice and Order issued for the property, most of a general nature, with a few focused on the specific factual issues. On a general level, the Appellants have asserted that the Notice and Order should be vacated or dismissed because of misbehavior by DDES staff. The only allegation in this category possessing any factual specificity is the contention that the Notice and Order should be dismissed because the DDES staff report for the hearing was issued late. This circumstance was alluded to earlier, where it was noted that, due to a misunderstanding over a possible agreement to continue the hearing, DDES staff relaxed its efforts to complete the staff report two weeks prior to the February 11, 2000 hearing as required by KCC 20.24.150. In order to retain the February 11, 2000 hearing date as desired by the Appellants, the DDES staff was allowed to serve its staff report late, with the understanding that the hearing could be continued to allow the Appellants to respond to the issues raised therein. In point of fact, the Macks did not receive the staff report until just prior to the hearing, and they provided written rebuttal testimony after the oral hearing had been completed.

25. This is not the first time in recorded history that a DDES staff report has not been filed by the two week deadline prior to the scheduled hearing date. Hearing Examiner Rule V.B specifically deals with this situation and describes the appropriate remedy. The Rule, in pertinent part, states as follows:

“Absence of the required department or division report, or delay in its issuance, shall not affect the jurisdiction of the examiner. Failure of the responsible County agency to timely issue the report required by KCC 20.24.150 shall constitute grounds for continuance upon motion by any party or interested person who demonstrated to the satisfaction of the examiner that the failure has resulted in prejudice to the moving party or person.”

Based on the foregoing provisions of Hearing Examiner Rule V.B, a late staff report does not require dismissal of the Notice and Order, and providing to the Appellants a continuance opportunity to respond to the late report was a satisfactory remedy for the delay.

26. The second general defense argued by the Appellants is that their research tree farm, established some 26 years ago, is an activity which pre-dates the adoption of County sensitive areas regulations and is therefore beyond their regulatory reach. Although no statutory or case law authority has been asserted in support of the Appellants' position, they appear to be arguing, in effect, that they have established a non-conforming use on the property which is entitled to be operated unrestricted by more recently adopted sensitive areas ordinances.

27. The non-conforming use model, unfortunately, does not apply in this circumstance because the Notice and Order does not challenge the legality of the tree farm use. Rather, the essential thrust

of the Notice and Order is to simply limit the intrusion of an otherwise legitimate tree farm activity into sensitive areas and their buffers, in order to assure that clearing and grading activity

is performed in an environmentally responsible manner. Thus, the DDES regulatory effort is directed not toward the type of use being pursued but the manner of its pursuit. This is a legitimate exercise of governmental authority and not limited by grandfathering restrictions.

28. Moreover, tree farming is not an activity that is subject to any specific code exemptions either for sensitive areas standards or shorelines regulations. KCC 21A.54.050 identifies the activities which are deemed exempt from sensitive areas regulation, and tree farming is not listed among them. Within the grading ordinance, KCC 16.82.050 authorizes exemptions from some permit requirements when the property has been committed to long-term forestry. But, in order to qualify for this exemption, the property owner needs to obtain Washington DNR approval for a timber management plan, a requirement concerning which Mr. Macks has steadfastly failed to comply.
29. The Appellants' primary defense against the current Notice and Order is based on the correspondence generated by the prior citation issued against them in 1994 by DDES. The Macks' position, as stated in Exhibit No. 62, is that, "Since we were absolved of any wrongdoing regarding the King County citation of 1994 and were found to be in compliance, it is our position that this set a precedent for all further work on our experimental tree farm." The Macks' contention is that the June 9, 1994 letter issued by Randy Sandin, Site Development Services Supervisor, regarding the 1994 Notice and Order had the effect of defining for all time the limits of County regulatory authority on the Macks' tree farm property. Since in 1994 DDES withdrew a Notice and Order involving clearing and grading clear to the edge of the Raging River, it is the Macks' position that the 1994 letter authorizes them to continue such activities indefinitely anywhere on the property.
30. Although the June 9, 1994 letter appears to be an abdication of County regulatory responsibility in view of the fact that no timber management plan was ever approved by DNR and therefore no deference to DNR jurisdiction was mandated, it cannot support the broad interpretation argued by the Macks. First, by its terms it only deals with the 1994 violation proceeding, and it is uncontested that the activities described in the current Notice and Order have occurred in different locations than those cited in 1994. More fundamentally, regardless of the contents of the June 9, 1994 letter, a DDES functionary may not permanently waive the application of adopted County codes unless such waiver is authorized therein. So, regardless of how poorly crafted the 1994 letter may have been, its legal effect is necessarily limited to the specific 1994 violations cited in the earlier Notice and Order. The only basis upon which a broader exemption could have been conferred would have been the submission of an approved DNR forest management plan.
31. Turning to the Appellants' more specific arguments, the main focus of their factual testimony was that, subsequent to issuance of the DNR Stop Work Order, they installed on the property satisfactory erosion and sedimentation control measures that were approved by DNR.

This position has substantial merit, as least as far as temporary erosion control measures are concerned within the portion of the property designated Area A. The September 29, 1999 letter from Susan Casey, DNR Forester, to Fred Macks quoted above supports this view.

32. Our conclusion is that the installation of rock check dams and the planting of small cedars and grass in Area A provides adequate temporary erosion and sedimentation control in that portion of the property and, with adequate maintenance, provides the basis for satisfactory permanent control as well. This portion of Area A is not, however, the only place where erosion and sedimentation problems exist. More specifically, within the newly excavated roadside ditches, both in Area A and Area C, there will be a need for further erosion and sedimentation control measures.
33. The Macks have also argued that the portion of the Notice and Order dealing with shoreline management jurisdiction should be dismissed from the Notice and Order because there has been no showing that shoreline regulations have been violated. This argument somewhat misses the point of the Notice and Order. King County regulations provide that when activities are proposed within the 200 foot shoreline jurisdiction, the property owner needs to undergo a review with DDES as to whether a permit is in fact required. If a permit is not required, then a shoreline exemption is issued. The Notice and Order does not specifically aver that a shoreline permit is required, but rather simply that the requisite review of activities within shoreline jurisdiction has not been done, an assertion that has not been contested by the Appellants. At this point, it would be premature to suggest what shoreline permits, if any, would be required, but we note that KCC 25.20.060 requires that a conditional use permit be issued for forest practices within shoreline jurisdiction.

CONCLUSIONS:

1. Grading activity requiring the issuance of a King County permit under KCC Chapter 16.82 has occurred on the Appellants' property as alleged in the Notice and Order issued October 12, 1999. Excavation and filling activity involving movement of more than 100 cubic yards of earth material have occurred in the northwest corner of the property, where a large area next to the Raging River was cleared and graded. An even larger scale excavation and filling activity has taken place in the south central portion of the property, in the general vicinity designated Zone 8 within Reference 7 to Exhibit No. 62, and referred to as Area C within Exhibit No. 67.
2. Clearing and grading has also occurred in regulated sensitive areas without required County permits and approvals. These include the clearing and grading adjacent to the Raging River referenced in Conclusion No. 1, above, as well as clearing and grading in the southwestern portion of the property, both within the regulatory buffer for the Raging River and within and adjacent to a Class 2.S stream and its associated wetland.
3. With the exception of the large scale clearing in Area C, most of the clearing and grading activity described in Conclusion Nos. 1 and 2, above, has also occurred within 200 feet of the ordinary high water mark for the Raging River and therefore lies within Shoreline Management Act jurisdiction. For development activities within shorelines jurisdiction, County codes require the property owner to either obtain a shoreline exemption or apply for required shoreline permits. The Appellants have done neither.
4. The Appellants have installed erosion and sedimentation control measures in the northwest quadrant of the property, which measures have been inspected and found adequate by the State Department of Natural Resources. Except for additional grass seeding and required maintenance,

these facilities should be deemed satisfactory. In other portions of the property, however, grading has occurred without adequate erosion and sedimentation control, especially within the ditches alongside newly graded roads. Erosion and sedimentation control measures are therefore required at locations lying outside the area where the rock check dams have been installed and new seedlings planted.

5. As recited in the findings, two issues have been dismissed from the Notice and Order. These are the citations for conducting a Class IV General forest practice without required permits or approvals, and the construction of a wooden deck without a building permit. The former issue is dismissed without prejudice, based on the fact that the State Department of Natural Resources retains jurisdiction to enforce forest practice permit violations.
6. While one can hardly fail to be impressed with the scientific value of the Macks' experimental tree farm and the care and planning that has gone into its general implementation, this does not and cannot excuse the Appellants from their legal responsibility to avoid damaging regulated sensitive areas.

Admittedly, the regulatory environment has changed dramatically since 1974 when the tree farm was started. At that time it was likely deemed acceptable to engage in land alteration activities up to the edge of the Raging River channel, and to alter and divert smaller streams and wetlands. But as our understanding of the County's salmonid resources has increased, a greater appreciation has emerged of the many ways in which upland land alteration activities can inadvertently and unintentionally threaten salmon survival. With the recent listing of a number of Puget Sound salmon stocks under the federal Endangered Species Act, protection of the remaining salmon resources has become a high public priority. In response to these concerns, protective sensitive areas regulations for streams and wetlands have become increasingly stringent. While the Macks' unawareness of these requirements may have been understandable in 1994 when they first crossed paths with the State and County regulatory bureaucracies, at this date six years later such willful ignorance can no longer be excused.

DECISION:

The appeal is GRANTED with respect to the items in the October 12, 1999 Notice and Order relating to obtaining a Class IV General forest practice permit and a building permit for an existing wooden deck, and is DENIED in all other respects.

ORDER:

1. No penalties shall be assessed against the property subject to the Notice and Order if both of the following requirements are met by the Appellants prior to June 30, 2000:
 - a. A complete application is submitted to DDES for a clearing and grading permit in the manner outlined within the October 12, 1999 corrected Notice and Order.

Implementation of further erosion and sedimentation control measures in the area where check dams have been installed and seedlings planted will not be required, beyond the

possible necessity of additional grass seeding. A wetland delineation will be required in the area within the property's southwest quadrant traversed by the spring-fed stream.

This stream shall be classified 2.S unless the Appellants submit a stream study establishing a lower classification.

- b. The Appellants shall either obtain a shoreline exemption or apply for the required shoreline permits for development activities located within 200 feet of the Raging River.
2. DDES shall be authorized to modify the foregoing requirements if the Appellants submit a timberland management plan approved by the Washington Department of Natural Resources and install permanent markers acceptable to DDES along the outer boundary of the regulatory sensitive areas buffer for the Raging River.

ORDERED this 19th day of April, 2000.

Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 19th day of April, 2000, to the following parties and interested persons:

Fred and Nell Macks
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Bellevue, WA 98004

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE FEBRUARY 11, 2000, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9900708 – FRED MACKS/FAN FAMILY TRUST:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department was Manuela Winter. Participating in the hearing and representing the Appellants were Fred and Nell Macks. Other participants in this hearing were Susan Casey, Jon Pederson, Jim Ballweber and Stephen Conroy.

The following exhibits were offered and entered into the record:

- | | |
|----------------|--|
| Exhibit No. 1 | <i>Excluded from the hearing record</i> |
| Exhibit No. 2 | Copy of Stop Work Order, posted by Manuela Winter on June 24, 1999 |
| Exhibit No. 3 | <i>Excluded from the hearing record</i> |
| Exhibit No. 4 | Copy of photos taken by Manuela Winter on June 24, 1999 |
| Exhibit No. 5 | Copy of the King County Sensitive Areas map folio streams and 100-year flood plains map, showing a Class 2S stream in the area of the Fan Family Trust property. |
| Exhibit No. 6 | Copy of the Thomas Guide map page for the area, showing Lake Creek on the Fan Family Trust property south of SE 111 th Place. |
| Exhibit No. 7 | Copy of GIS map showing GIS identified sensitive areas on and around the Macks properties |
| Exhibit No. 8 | <i>Excluded from the hearing record</i> |
| Exhibit No. 9 | <i>Excluded from the hearing record</i> |
| Exhibit No. 10 | Copy of appeal of stop work order dated July 8, 1999 |
| Exhibit No. 11 | <i>Excluded from the hearing record</i> |
| Exhibit No. 12 | Copy of photos taken by Manuela Winter on July 12, 1999 |
| Exhibit No. 13 | Copy of rough sketch of property showing photo points for photos in Exhibits 4 and 12 |
| Exhibit No. 14 | <i>Excluded from the hearing record</i> |
| Exhibit No. 15 | <i>Excluded from the hearing record</i> |
| Exhibit No. 16 | Copy of photos taken by Susan Casey, WADNR, with descriptions of each photo |
| Exhibit No. 17 | Copy of sketch prepared by Susan Casey, WADNR, for July 20, 1999 site visit |
| Exhibit No. 18 | <i>Excluded from the hearing record</i> |
| Exhibit No. 19 | <i>Excluded from the hearing record</i> |
| Exhibit No. 20 | <i>Excluded from the hearing record</i> |
| Exhibit No. 21 | <i>Excluded from the hearing record</i> |
| Exhibit No. 22 | Copy of July 31, 1999 letter sent by Fred Macks to WADNR |
| Exhibit No. 23 | Copy of August 13, 1999 WADNR Forest Practices Notice to Comply to the Fan Family Trust |
| Exhibit No. 24 | <i>Excluded from the hearing record</i> |
| Exhibit No. 25 | <i>Excluded from the hearing record</i> |
| Exhibit No. 26 | <i>Excluded from the hearing record</i> |
| Exhibit No. 27 | <i>Excluded from the hearing record</i> |
| Exhibit No. 28 | <i>Excluded from the hearing record</i> |
| Exhibit No. 29 | <i>Excluded from the hearing record</i> |
| Exhibit No. 30 | <i>Excluded from the hearing record</i> |
| Exhibit No. 31 | <i>Excluded from the hearing record</i> |
| Exhibit No. 32 | Copy of September 13, 1999 Hearing Examiner's Pre-Hearing Order |
| Exhibit No. 33 | <i>Excluded from the hearing record</i> |
| Exhibit No. 34 | Copy of September 7, 1999 WADNR letter to Fred Macks |
| Exhibit No. 35 | Copy of September 8, 1999 WADNR notice for an interdisciplinary meeting scheduled for September 21, 1999 on the Mack's violations |
| Exhibit No. 36 | <i>Excluded from the hearing record</i> |
| Exhibit No. 37 | Copy of September 29, 1999 WADNR letter to Fred Macks regarding the September 21, 1999 meeting. |
| Exhibit No. 38 | <i>Excluded from the hearing record</i> |
| Exhibit No. 39 | <i>Excluded from the hearing record</i> |
| Exhibit No. 40 | Copy of Notice and Order dated October 12, 1999, issued by DDES to the Fan Family Trust, c/o Fred Macks, Trustee |
| Exhibit No. 41 | Copy of Notice and Statement of Appeal submitted October 19, 1999 by Fred Macks |
| Exhibit No. 42 | <i>Excluded from the hearing record</i> |
| Exhibit No. 43 | <i>Excluded from the hearing record</i> |
| Exhibit No. 44 | <i>Excluded from the hearing record</i> |
| Exhibit No. 45 | Copy of January 11, 2000 Hearing Examiner's Pre-Hearing Order |

- Exhibit No. 46 Sketch prepared by Manuela Winter of the areas of disturbance/field observations from January 18, 2000 site investigation
- Exhibit No. 47 Copies of 1990 aerial photos of the Macks property
- Exhibit No. 48 Copies of the 1995 aerial photos of the Macks' property
- Exhibit No. 49 Copies of the 1996 aerial photos of the Macks' property as provided on King County's GIS computer program.
- Exhibit No. 50 Photos taken by DDES staff during the January 18, 2000 site investigation
- Exhibit No. 51 Copy of Exhibit No. 46 marked up to show approximate location and direction of photos in Exhibit No. 50.
- Exhibit No. 52 Copy of a portion of the most recent King County Assessor's map showing the Fan Family Trust/Macks properties.
- Exhibit No. 53 Copy of GIS map with parcels and corresponding parcel numbers for the Macks property as of January 24, 2000
- Exhibit No. 54 Copy of a GIS map reflecting results from some of the property research conducted by DDES on July 20, 1999.
- Exhibit No. 55 *Excluded from the hearing record*
- Exhibit No. 56 *Excluded from the hearing record*
- Exhibit No. 57 *Excluded from the hearing record*
- Exhibit No. 58 Copy of February 4, 2000 DDES request for continuance
- Exhibit No. 59 Copy of February 7, 2000 Hearing Examiner's Order on Motion and Revised Notice of Public Hearing
- Exhibit No. 60 DDES staff report dated February 10, 2000
- Exhibit No. 61 Appellant's Part I; Request for Immediate Dismissal and Denial of Continuance
- Exhibit No. 62 Appellant's Part II; Specific Answers to Allegations Outlined in 1/11/00 Pre-Hearing Order, DDES File No. E9900708
- Exhibit No. 63 Copy of DDES Notice and Order, File No. E9400279, dated March 2, 1994
- Exhibit No. 64 Copy of letter dated April 9, 1994, from Randy Sandin, DDES, to Fred Macks
- Exhibit No. 65 Copy of June 3, 1994 letter from Cyril Moya, WADNR, to Jim Ballweber, DDES
- Exhibit No. 66 Copy of DDES Notice of Satisfaction and Notice of Cancellation, dated June 13, 1994 and June 30, 1994, respectively
- Exhibit No. 67 Copy of sketch by Manuela Winter, prepared after 1/18/00 site visit, and highlighting areas of Macks' properties.

The following exhibit was offered and entered into the record on March 7, 2000:

- Exhibit No. 68 Corrected DDES Notice and Order
- Exhibit No. 69 Written rebuttal testimony, submitted by Appellants Macks

The following exhibit was offered and entered into the record on March 15, 2000:

- Exhibit No. 70 Letter with attachments from Manuela Winter, DDES, dated March 13, 2000

